86-581

No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

NEW YORK STATE RESTAURANT ASSOCIATION, INC.; BUS TRAVELERS INN, INC.; and HERO-BOY, INC., d/b/a Manganaro's Hero-Boy Restaurant,

Plaintiffs-Appellants,

against

THE CITY OF NEW YORK; and DAVID J. SENCER, M.D., M.P.H., Commissioner of Health of The Department of Health, and Chairman of the Board of Health,

Defendants-Appellees.

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS

JURISDICTIONAL STATEMENT

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October 6, 1986

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Questions Presented

I

Does the transfer of the adjudication of Health Code violations to a mayoral-appointed Board with purported authority to impose sanctions of imprisonment as well as monetary fines, without any enabling legislation, constitute a denial of due process of law under the XIV Amendment to the Constitution of the United States?

II

Does the fact that the same administrative body, the Board of Health, imposes the criminal sanctions and is responsible for the collection, assessment and enforcement of fines exacted under its rule-making and purported enforcement powers constitute a denial of due process of law?

III

Do the fines exacted from the licensed premises under the Health Code by the Administrative Tribunal in the Department of Health constitute a taking of property without due process of law?

IV

Do the inspections and supervisory re-inspections of the licensed premises constitute an unreasonable search and seizure under the IV Amendment without warrant, enforcible against the States under the XIV Amendment to the Constitution of the United States?

V

Is the Regulation of the Commissioner of Health issued July 6, 1983, unconstitutionally vague?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

NEW YORK STATE RESTAURANT ASSOCIATION, INC.; BUS TRAVELERS INN, INC.; and HERO-BOY, INC., d/b/a Manganaro's Hero-Boy Restaurant,

Plaintiffs-Appellants,

against

THE CITY OF NEW YORK; and DAVID J. SENCER, M.D., M.P.H., Commissioner of Health of The Department of Health, and Chairman of the Board of Health,

Defendants-Appellees.

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS

JURISDICTIONAL STATEMENT

New York State Restaurant Association, Inc.; Bus Travelers Inn, Inc.; and Hero-Boy, Inc., d/b/a Manganaro's Hero-Boy Restaurant, Plaintiffs-Appellants, appeal from the final judgment of the New York State Court of Appeals dated July 10, 1986, leaving standing the order of the New York Supreme Court, Appellate Division, First Department, dated April 1, 1986, and affirming the judgment entered in the Supreme Court, Special Term, New York County, on October 28, 1985, (1) granting Defendants-Appellees' motion for summary judgment; (2) denying the motion of Plaintiffs-Appellants for summary judgment; and (3) dismissing the complaint of Plaintiffs-Appellants.

The New York State Court of Appeals, in a final order dated July 10, 1986, granted Defendants-Appellees' motion

to dismiss the appeals to that Court on the ground that there were no substantial constitutional questions involved in them.

Opinions Below

This action was commenced in the New York Supreme Court, New York County, on or about August 5, 1983, by service of a Summons and Complaint, and an application was made for a preliminary injunction, which was denied by order and memorandum of Hon. Stanley Ostrau, dated January 21, 1984, which appears in the appendix hereto, p. 14a, *infra*, in which he refused to dismiss the Complaint for failure to state a cause of action, and denied the preliminary injunction for failure to demonstrate a likelihood of success on the merits, irreparable injury absent such relief and that the balance of the equities lies in favor of the Plaintiffs-Appellants. The Plaintiffs-Appellants appealed to the Appellate Division, First Department, from the decision of Hon. Stanley Ostrau, and the State of New York cross-appealed. On November 8, 1984, the Appellate Division modified the order of Special Term to the extent of granting the motion by defendant State of New York to dismiss the Complaint against it for failure to state a cause of action and otherwise affirmed. The opinion of the Appellate Division, First Department, appears in the appendix hereto, p. 12a, *infra*, and is reported at ____ A.D.2d ____ (1984).

Thereafter, the State of New York having been dropped as a party, an order was entered on October 29, 1985, by Hon. Eugene Wolin at Special Term which denied Plaintiffs-Appellants' motion for summary judgment on the merits and granted the cross-motion of the City of New York, *et al.*, Defendants-Appellees, to dismiss the Complaint. The opinion of Judge Wolin appears in the appendix hereto at p. 4a, *infra*.

An appeal was taken to the Appellate Division, First Department, which affirmed the order of the Supreme

Court, Special Term, entered on October 29, 1985, for the reasons stated in the opinion of Judge Wolin. The opinion of the Appellate Division, First Department, appears in the appendix hereto, p. 3a, *infra*, and is reported at ____ A.D.-2d ____ (1985) 500 N.Y.S.2d 224.

On July 10, 1986, the New York State Court of Appeals dismissed the appeal upon the ground that no substantial constitutional question was directly involved. The opinion of the New York State Court of Appeals appears in the appendix hereto at p. 1a, *infra*, and is reported at 68 N.Y.S.2d 753 (1986).

This appeal is being docketed in this Court within 90 days from the date of the decision of the New York State Court of Appeals.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

Constitutional Provisions and Statutes

Amendment XIV, Section 1, of the United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment IV of the United States Constitution

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon

probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment to § 558(d) of the New York City Charter made by Chapter 221, L. 1980, effective June 10, 1980, almost two years after the resolution adopting § 3.12 of the New York City Health Code.

(d) Any violation of the health code shall be treated and punished as a misdemeanor. The board of health or an administrative tribunal established by the board of health to enforce the provisions of the health code shall have the power to enforce its final decisions and orders imposing pecuniary penalties as if they were money judgments, without court proceedings, in the manner described herein. After four months from the issuance of such a final decision and order by such board or tribunal a copy of such decision and order shall be filed in the office of the clerk of any county within the city. In the event that the decision and order were issued as a result of the respondent being in default shall be mailed to such respondent at least seven days before such filing, and a copy of such notice and a receipt of mailing thereof shall be filed with the copy of such decision and order. Upon such filing, such county clerk shall enter and docket such decision and order, in the same manner and with the same effect as a money judgment. Upon such entry and docketing, such decision and order may be enforced as provided in article fifty-two of the civil practice law and rules. Such board or tribunal shall not enter any final decision or order pursuant to the provisions of this sub-

division unless the notice of violation shall have been served in the same manner as is prescribed for service of process by article three of the civil practice law and rules or article three of the business corporation law. Such board or tribunal may apply to a court of competent jurisdiction for enforcement of any other decision, order or subpoena isued by such board or tribunal. Nothing herein contained shall be construed to limit or abridge the board's or the department's right to pursue any other remedy prescribed by law. Pecuniary penalties for violations of the health code may be recovered in a civil action before any court in the city having jurisdiction of civil actions.

New York City Health Code, § 3.12, enacted by resolution on October 28, 1971, without enabling legislation:

§ 3.12 Fines, penalties and forfeitures for certain violations of the Code

Every person who holds, or is required to hold, a permit from the Board or the Commissioner or who is registered, or required to be registered, with the Department shall be subject to a fine, penalty and forfeiture of not less than twenty-five and not more than five hundred dollars for each violation of a provision of this Code relating to such businesses, trades, occupations and other activities. Each such violation shall be a separate and distinct offence, and in the case of a continuing violation, each day's continuance thereof shall be a separate and distinct offence.

New York City Charter, § 1105(b):

(b) No rule or regulation of an officer of the city or of a city agency, including but not limited to

those with respect to the fixing of charges or penalties, nor an amendment or addition thereto, shall be adopted or repealed pursuant to any provision of this charter, unless, prior thereto, there shall be afforded by such officer or agency an opportunity for interested persons to comment in writing thereon by a date certain to be specified in a notice published at least twice in the City Record, the first publication being not less than twenty days and the second publication being not more than ten nor less than five days preceding the date so specified. The notice shall set forth the text and an explanation of the rule, regulation, amendment or addition and the authority pursuant to which it is proposed to be adopted or repealed. Such publication in the City Record shall constitute complete legal notice. (Subd. b amended by L.L. 1977, No. 102, Dec. 30, eff. Jan. 1, 1978.)

Regulation of Commissioner of Health, dated July 6, 1983:

RESTAURANTS FAILING INSPECTION

1. Restaurants failing any inspection shall be ordered to appear before the Department's Administrative Tribunal.

2. A fine shall be assessed against the premises based upon the type of condition found, severity of the condition and the inspection category (see below).

3. The Department shall inform the food service operator both by telephone and mail of the assessed fine and of the opportunity to plead to the charges by mail. Instructions and forms for the mailing of pleas and/or fines shall be sent to the owner.

4.Failure to plead by mail or appear in person at the Administrative Tribunal shall result in a default judgment. The operator or person in charge shall be notified of the default judgment and the penalties for non-compliance.

5. Fine Schedule by Inspection Category

a. Initial Inspection

	Severity Factor		
Type of Violation	1	2	3
Schedule "A"		$30	$40
Non-Schedule "A"	$25	$30	$30

b. First Re-Inspection R-1

	Severity Factor		
Type of Violation	1	2	3
Schedule "A"		$100	$150
Non-Schedule "A"	$35	$50	$70

6. Subsequent Re-Inspection(s) (R-2, R-3)

a. Respondents failing these inspections must appear in person before the Department's Administrative Tribunal.

b. Establishments failing in second reinspection are subject to immediate closing.

Raising the Federal Question

At the earliest possible stage of the proceedings below, the Plaintiffs-Appellants raised the claims herein in their Complaint. These constitutional claims were reiterated by the Plaintiffs-Appellants before the Supreme Court, Appellate Division, First Department, on two occasions, as a denial of due process, equal protection, and a taking of property without due process of law under the XIV Amendment of the United States Constitution; as a violation of constitutional prohibition against unreasonable

search and seizures under the IV Amendment of the United States Constitution; enforced against a state under the XIV Amendment. The same arguments were advanced in the New York State Court of Appeals as were advanced in the Court below, and that Court, in its opinion dated July 10, 1986, stated that there were no substantial constitutional questions involved. It thus considered and expressly rejected these constitutional claims.

Statement of the Case

For many years violations of the New York City Health Code were heard in the Magistrates' Court, for they were criminal proceedings. On October 28, 1971, the Board of Health promulgated Article 7 of the Code without any enabling legislation from the State or for that matter, from the City of New York, and established a "tribunal" to hear Health Code cases. The enforcement of the resolution was held in abeyance for over a year for the reason that it was not filed with the office of the City Clerk. This was adopted even though it was contrary to Article 6, § 1, of the New York State Constitution, which provided for a single city-wide court to hear civil cases, and one city-wide court to hear criminal cases. There was no express provision authorizing such a "tribunal" in the Constitution, nor provision empowering the Legislature to create such a court. The Board of Health lacked the power to promulgate Article 7 of the Health Code and it was acting in a prohibited field.

On July 6, 1983, the Department issued a Regulation, making the mere failure to pass an inspection subject to fine, and, after the fact, providing for notice to the restaurant by telephone or mail, without any constitutional safeguards.

The Department here exercises legislative, executive and judicial powers in the promulgation of the Health Code, the enforcement of the Code, and in its application. An enforcement method used by the Department involves the

issuance of press releases to the media publicizing the violations.

In fiscal 1984, according to the City Comptroller's Report M F 84-502, filed November 20, 1985, restaurants in New York City paid $1.5 million in permit fees and another $1.5 million in fines to the City (page 2). The Comptroller's Report was critical of the Department for not having collected more (page 4).

Although New York City does not have provisions in its Code requiring annual inspections of restaurants, the Comptroller's Report has prodded the Health Department to make such yearly inspections without any legislative authority. Five percent of such inspections receive a supervisory check to ensure the integrity of the inspection. This is clearly a violation of the Fourth Amendment to the U.S. Constitution prohibiting unreasonable searches and seizures, and all without Warrant. The Health Code is no longer a Code concerned with health matters, but rather becomes a crude revenue-raising measure promulgated by a mayoral-appointed Board with no State or City legislative authority. *Marshall v. Barlow's, Inc.*, 436 U.S. 307; *Camara v. Municipal Court*, 387 U.S. 523; *See v. City of Seattle*, 387 U.S. 541.

On the matter of legislation by mayoral-appointed boards, such practices have been invalidated in New York. *Under 21, Catholic Homes Bureau for Dependent Children v. City of New York*, 65 N.Y.2d 344 (1985); *Subcontractors Trade Association v. Koch*, 62 N.Y.2d 422 (1984).

As James Madison, one of the authors of the U.S. Constitution, has stated:

> The accumulation of all powers, legislative, executive, and judiciary in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.

The Association Plaintiff-Appellant has for twenty years objected to the appeal procedures of the New York State Department of Taxation and Finance as being inherently unfair because the same administrative body, the State Tax Commission, was responsible for the collection, assessment and enforcement of the taxes it administers through the Department, as well as the adjudication of controversies arising from such administration. By curious coincidence, the Governor signed C. 282 of the Laws of 1986 on July 19, 1986, nine days after the Court of Appeals' decision in the instant case, which legislation set up an independent Division of Tax Appeals, and as the Governor's memorandum states: "It will result in separation of the rule-making and enforcement responsibilities of the Department and the Commissioner of Taxation and Finance from the quasi-judicial responsibilities of the Tax Appeals Tribunal." A copy of the Governor's Memorandum on approving C. 282, L. 1986, appears in the appendix hereto, p. 18a, *infra*, and is reported in McKinney's Session Laws for 1986, p. A-858. Here too, all that the Plaintiffs-Appellants in this litigation seek is adjudication of alleged violations by an independent body other than the Board of Health.

In the *Matter of Rosenthal v. Hartnett*, 36 N.Y.2d 269, in a 4 to 3 decision, the Court of Appeals permitted a transfer of adjudication from a Court to an administrative adjudicator, but only "where conviction can result only in the imposition of fines with no imprisonment," and the present and immediate past Chief Judge dissented even to that limited change. The adjudications in *Rosenthal* were essentially administerial in nature.

The teachings of this court have consistently been to the effect that procedural due process bars ostensibly impartial decision-makers from deciding cases whose outcome directly and substantially affects their personal financial interests or the financial concerns of organizations for which they are responsible. *Tumey v. Ohio*, 273 U.S. 510 (1927); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

The Questions are Substantial.

In the instant case, we have an administrative regulation without any prior enabling legislation from either the City or the State, masquerading under the guise of a statute, and with its enactment, administration and adjudication all placed in the hands of an mayoral-appointed board. This is precisely what James Madison characterized as "the very definition of tyranny," and it should not be permitted.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal

Respectfully submitted,

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Counsel for Plaintiffs-Appellants

October 6, 1986

Opinion of the New York Court of Appeals, July 10, 1986. 68 N.Y.2d 753 (1986)

1 Mo. No. 744 SSD 90

New York State Restaurant Association, *et al.*,

Appellants,

vs.

The City of New York, *et al.*,

Respondents.

Appeal dismissed without costs, by the Court *sua sponte*, upon the ground that no substantial constitutional question is directly involved.

DECISION COURT OF APPEALS JUL 10 1986

Order of the New York Count of Appeals, July 10, 1986

State of New York, Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the .....tenth..... ***day of*** ..... July ..... ***A.D. 1986***

Present, HON. SOL. WACHTLER, *Chief Judge, presiding.*

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1 Mo. No. 744 SSD 90

New York State Restaurant Association, *et al.*,

Appellants,

vs.

The City of New York, *et al.*,

Respondents.

The appellants having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte,* upon the ground that no substantial constitutional question is directly involved.

/s/ Donald M. Sheraw

Donald M. Sheraw
Clerk of the Court

Opinion of the Appellate Division, First Department, April 1, 1986. 500 N.Y.S.2d 224 (1986)

NEW YORK STATE RESTAURANT ASSOCIATION, INC., et al.,
Plaintiffs-Appellants,

v.

The CITY OF NEW YORK, et al.,
Defendants-Respondents.

Supreme Court, Appellate Division, First Department. April 1, 1986. G.A. Navagh, New York City, for plaintiffs-appellants. P.S. Dolgow, New York City, for defendants-respondents. Order, Supreme Court, New York County (Eugene Wolin, J.), entered on October 29, 1985, unanimously affirmed for the reasons stated by Eugene Wolin, J., at Special Term, without costs and without disbursements.

MURPHY, P.J., and SULLIVAN, ROSS, ASCH and MILONAS, JJ., CONCUR.

Opinion of the Supreme Court, Special Term (Wolin, J.) October 4, 1985

NEW YORK LAW JOURNAL
FRIDAY, OCTOBER 4, 1985

JUSTICE WOLIN

N.Y. STATE RESTAURANT ASSOCIATION, INC. v. CITY OF N.Y.—The plaintiffs in this action are a trade association representing approximately 1,200 restaurants operating in the City of New York and licensed by the Department of Heath (the Department) and two individual restaurants also operating in the City and licensed by the Department. They have brought this action for a judgment declaring that the system of inspection and enforcement of the health code utilized by the Department is unconstitutional, in excess of statutory authority and that enforcement regulations have been promulgated without notice to or an opportunity to comment by interested persons. This matter is now before the court on the motion of plaintiffs for summary judgment and the cross-motion of defendants for summary judgment dismissing the complaint.

The general enabling legislation for the Department of Health is found in Chapter 22 of the New York City Charter. That chapter vests in the Department and its commissioner the authority necessary to regulate all matters affecting health in the City (NY City Charter §§555,556). The charter also provides for a Board of Health within the Department whose chair shall be the Commissioner of the Department of Health (NY City Charter §553). The Board of Health is authorized to add to, amend or repeal any part of the health code of the City and may:

" . . . confer additional powers on the Department not inconsistent with the constitution, laws of this state or this charter, and may provide for the enforcement of the health code or any orders made by the Commissioner or the

Board of Health, by such fines, penalties, forfeitures and imprisonment as may be prescribed therein or otherwise by law" (NY Charter §558[b]).

The health code had been promulgated pursuant to the authority of section 558 of the charter and establishes the enforcement procedures of the Department. Article 3 of the Health Code is a general statement of the authority of the Department and provides that the Department may inspect any premises where an activity regulated by the health code is being carried on (Health Code §3.01[a][b]). Any person or establishment which is determined to have violated the code is subject to a fine, penalty or forfeiture or any permit issued by the Department (Health Code §3.12). Prosecution of every violation is not mandated by the code. Pursuant to section 3.13 of[sic] the Department may seek voluntary compliance through the issuance of notices and warnings or may proceed by other educational alternatives. However, the availability of such voluntary methods does not restrict the Department in its use of compulsory enforcement methods and there is no requirement that voluntary or non-compulsory methods be employed prior to the commencement of any code enforcement proceeding. As part of its enforcement powers, the Department has classified various types of code violations for restaurants and other food service establishments. Those violations which are considered to be the most serious are classified as "Schedule A"; all other violations are "Non-Schedule A." The Schedule A list was last revised in 1974.

In addition to classification of violations, the Department has also employed a numerical scoring system [which] was introduced in 1980 and establishes a minimum passing score for an inspection. The violation classification system and the scoring system are based upon specific criteria and both are explained as part of the mandatory food protection course given by the Department to all new food service establishment licensees. Article 7 of the Health Code establishes an administrative tribunal to hear and

determine allegations by the Department of code violations and to impose fines and penalties (Health Code §7.01). After notification of the violation, the licensee may either admit to the violation and pay a fine or may serve an answer and demand a hearing before the tribunal. At that hearing the burden of proof is on the Department and the licensee has the right to be represented by counsel, to present evidence and to cross-examine witnesses (Health Code §7.09). An adverse determination can be appealed to a department review board (Health Code §7.13) and the determination of the review board is subject to judicial review in an Article 78 proceeding.

With respect to the fines imposed by the administrative tribunal section 558(d) of the New York City Charter was amended by Chapter 221 of the laws of 1980 to permit the tribunal to docket a final determination or order as a money judgment in a court of competent jurisdiction. That subdivision also provides that the violation of any section of the health code may be prosecuted as a misdemeanor. Supplementing this statutory and regulatory framework are several orders and directives of the Commissioner of the Department. Prior to 1976 the Department did not issue a notice of violation until a food service establishment failed an initial inspection and two re-inspections. In 1976 the Department issued a directive, enforcement procedure OEH-29, which changed that policy. Pursuant to that directive a notice of violation was to be issued to any establishment which failed an initial interview and one re-inspection. Thereafter on July 6, 1983 the Commissioner of the Department issued an order which once again changed the enforcement policy. Effective Aug. 1, 1983, the Department would issue a notice of violation for failure of any inspection. In a cover letter accompanying a copy of his enforcement order sent to licensees, the commissioner stated that his policy change was made necessary because "more than half of all inspected restaurants fail their first inspection before initiating corrective

action." In addition the Department now publishes the names of those establishments which have been adjudged by the administrative tribunal to have failed both an initial inspection and a re-inspection.

In support of their motion the plaintiffs raise the following points: the establishment of an administrative tribunal by the Department constitutes an invalid exercise of authority vested in the legislature; the tribunal violates Article VI sections 1 and 15 of the state constitution which provides for a unified city-wide court system; the enforcement of the health code by the Department deprives plaintiffs of due process protection; the order of July 6, 1983 is unconstitutionally vague; and that the July 6 order is unenforceable because it was not published in the City Record pursuant to section 1105(b) of the New York City Charter. Plaintiffs also argue that publication of the names of those restaurants with code violations constitutes a bill of attainer and has a chilling effect on restauranteurs, presumably in derogation of their right to cook.

The constitutional arguments raised by plaintiffs are without merit. The establishment of an administrative tribunal is within the broad grant of authority given to the Board of Health by section 558(b) of the New York City Charter. The courts have repeatedly held that section 558 is not an unconstitutional delegation of power by the legislature but rather a permissible exception grounded in the belief that the protection of public health is a matter best left to the locality involved (Grossman v. Baumgartner, 17 N.Y.2d 345; People of State of New York v. Blanchard, 288 N.Y. 145; Matter of Stracquadanio v. Dept. of Health of the City of New York, 285 N.Y. 93). The reliance of plaintiffs on the decision of the Court of Appeals in Under 21, Catholic Home Bureau for Dependent Children v. City of New York (--N.Y.2d--, NYLJ July 5, 1985, p.17, col. 1; Subcontractors Trade Assn v. Koch, 62 N.Y.2d 422; and Matter of Broidrick v. Lindsay, 39 N.Y.2d 641 is misplaced). Those cases stand for the proposition that the

executive may not implement a remedial program which exceeds the stated policy of the legislature. Within the bounds of that policy, however, the executive has great discretion in determining the proper method of enforcement. The enabling statutes give the Board of Health broad discretion in selection of enforcement measures necessary to safeguard the public health including the promulgation of regulations, the creation of a classification system for code violations and the establishment of an administrative tribunal. Given the broad statutory mandate and the importance of the task, the court should not invalidate the regulatory scheme adopted by the Board of Health unless it is clearly without a rational basis (Matter of City of New York v. State of New York Comm. on Cable Television, 47 N.Y.2d 89; Grossman v. Baumgartner, 17 N.Y.2d 345, supra; Matter of Stracquadanio v. Dept. of Health of City of New York, 285 N.Y. 93, supra). The enforcement scheme challenged here is neither irrational nor in excess of the authority vested in the Board of Health.

Nor is the administrative tribunal a court within the meaning of Article VI sections 1 and 15 of the state constitution which provide for a single city-wide court system. The transfer of jurisdiction to hear, determine and impose penalties upon incidents of statutory violations to the administrative agency charged with responsibility for the enforcement of the statute is an important part of the regulatory scheme (Matter of Rosenthal v. Harnett, 36 N.Y.2d 269; Matter of Voccola v. Shilling, 88 Misc. 2d 103 aff'd 57 A.D.2d 931). While proceedings before the agency may be quasi-judicial in character, this does not transform the agency or its administrative tribunal into a constitutional court (People ex rel. Crane v. Hahlo, 228 N.Y. 309 aff'd 258 U.S. 142; Leganowicz v. Rone, 240 App. Div. 731). Finally the mere fact that the fines imposed by the administrative tribunal may be docketed as money judgments in the courts does not violate the state constitution

nor confer any additional status on the administrative (Matter of Voccola v. Shilling, 88 Misc.2d 103). The memorandum of the City submitted in support of the amendment to section 558(d) of the city charter makes it clear that this procedure is a ministerial one and permitted solely in aid of the enforcement of agency determinations (N.Y. Legis. Ann, 1980, pp. 98-99).

The due process argument of plaintiffs is similarly ill-founded. Due process is a flexible concept which requires at minimum, notice of the charges and an opportunity to rebut (Smith v. Organization of Foster Families for Equity and Reform, 431 U.S. 816). A full evidentiary hearing is not necessary to satisfy due process standards (Matthews v. Eldrige, 424 U.S. 319; Matter of Armere Holding Corp. v. Bell, 37 N.Y.2d 925; Matter of Fuller v. Urstadt, 28 N.Y.2d 315). As was indicated a licensee who has failed an inspection is given a statement of the violations found and may demand a hearing before the tribunal. At that hearing the burden is on the Department and the licensee has the right to be represented by counsel, to present evidence and to cross-examine witnesses. The determination of the tribunal is subject to administrative review and then judicial review in an Article 78 proceeding. It cannot seriously be argued that this procedure fails to protect the due process rights of licensees. Civil fines and penalties are an accepted tool in regulatory enforcement and the fact that the administrative tribunal may apply a lesser standard of proof than that required in a criminal prosecution does not rise to the level of a denial of due process (Matter of Rosenthal v. Harnett, 36 N.Y.2d 269, supra).

The claim that the order of July 6, 1983 is vague is not well-taken. The order clearly delineates the enforcement policy of the Department and refers to the well-established classification system for code violations as well as the scoring system used by the Department. Further, the Schedule A violations and the scoring system are topics explained as part of the mandatory course given by the Department. Thus this claim is groundless.

Plaintiffs also argue that the July 6, 1983 order is actually a rule or regulation of the Department which is subject to the notice and comment rule-making provisions of section 1105(b) of the City Charter. It is conceded that the July 6 order was not published in the City Record and that there was no opportunity given to interested persons to comment upon the order. Thus it is the position of the plaintiffs that the order is unenforceable. However the notice and comment provisions do not apply to rule or regulations "which relate to the organization or internal management of any agency and do not materially affect the rights of or procedures available to the public . . . " (New York City Charter §1105[9][2]). In interpreting this section, the courts have drawn a distinction between regulations which affect the legislative or quasi-legislative powers of the agency and rules which merely concern the internal organization of the agency (People of State of New York v. Fogerty, 18 N.Y.2d 664; Matter of the Gaslight Club v. Catherhood, 30 A.D.2d 904; Ingalls Iron Works v. Fehlhaber Corp., 29 A.D.2d 29). After consideration the court is persuaded that the July 6, 1983 order falls within the latter category. The July 6 order as was its predecessor, enforcement procedure, OEH-29, were merely statements of the enforcement policy of the Department and as such were rules affecting the internal organization and management of the Department. The underlying duty of each food service establishment to comply with the health code did not change because of the enforcement policy followed by the Department. The former practice of the Department not to issue violations until failure of a second or third inspection did not mature into a right guaranteed by either statute or the health code. Rather the statutes and the health code require compliance at all times. Nor did the July 6 order affect any procedure otherwise available to the licensees. The provisions of Article 7 of the health code are unaffected and a licensee may demand a hearing before the administrative tribunal. The enforcement guidelines set forth in the July 6, 1983

order are within the discretionary authority of the Department and should not be disturbed by the court (People of the State of New York v. Eboli, 34 N.Y.2d 281).

Finally, the court finds nothing improper about the publication of the names of restaurants with code violations. The names of such establishments are not published until the administrative tribunal determines that the restaurant has failed both an initial inspection and a reinspection. The Department has a duty to alert the public to unsanitary conditions (Administrative Code of the City of New York §§556-9.0, 556-1.0) and publication of what is in any event a public record in an acceptable method of accomplishing that task. In addition publication may also serve as an indirect method of encouraging compliance throughout the industry. The constitutional objections raised by plaintiffs to publication are simply without merit.

Accordingly, the motion of plaintiffs for summary judgment is denied and the cross-motion of defendants for summary judgment dismissing the complaint is granted with costs and disbursements. Settle order.

Opinion of the Appellate Division, First Department, November 8, 1984

Sandler, J.P. Sullivan, Silverman, Milonas, JJ.

20961 New York State Restaurant Association, Inc.; et al., Plaintiffs-Appellants-Respondents, G.A.Navagh

-against-

The State of New York, Defendant-Respondent-Appellant, F.L.Lieberman

and

The City of New York, et al., Defendant-Respondents. K.M.Helmers

Order of the Supreme Court, New York County (Stanley Ostrau, J.), entered on February 6, 1984, which denied plaintiffs' motion for a preliminary injunction and denied the motion by defendant The State of New York to dismiss the complaint against it, is modified on the law to the extent of granting the motion by defendant The State of New York to dismiss the complaint against it for failure to state a cause of action and otherwise affirmed, without costs or disbursements.

Although suits against the State primarily seeking money damages should be brought in the Court of Claims (*Cass v. State of New York*, 58 NY2d 460; *Schaffer v. Evans*, 57 NY2d 992), it is clear that a declaratory judgment action in the Supreme Court is an appropriate means to attack the constitutionality of a statute. (*Cass v. State of New York, supra; Press v. County of Monroe*, 50 NY2d 695. However, in the instant matter, which involves a challenge to Chapter 221 of the Laws of 1980 amending section 558(d) of the New York City Charter, the only allegations against the State of New York relate to the fact that the State enacted the legislation at issue. There is no assertion that the State is responsible for the enforcement of this statute or the imposition of any penalties pursuant thereto or that

the State has ever attempted to institute enforcement proceedings against plaintiffs. Indeed, Chapter 221 expressly authorizes the Board of Health or an administrative tribunal established by the Board of Health to enforce the provisions in question. Consequently, the complaint fails to state a cause of action against defendant The State of New York, and Special Term should have granted the State's motion to dismiss.

All concur.

Order filed.

Opinion of the Supreme Court, Special Term, February 6, 1984 (Ostrau, J.)

SUPREME COURT : NEW YORK COUNTY
SPECIAL TERM : PART 1

(SAME TITLE) Index No. 19890/83

#110 of 9/93/83

Stanley Ostrau, J.:

Motion number 194 of the calendar of August 17, 1983 and motion number 110 of the calendar of September 15, 1983 are hereby consolidated for disposition.

In motion number 194, plaintiffs seek a preliminary injunction restraining defendants from administering the order of July 6, 1983 and imposing any sanctions thereunder. In motion number 110, defendant State of New York, moves pursuant to CPLR 3211, for an order dismissing the complaint for lack of subject matter jurisdiction and failure to state a cause of action.

This is an action for a declaratory judgment attacking the constitutionality of Chapter 221 of the Laws of 1980, City Charter Section 558 subdivision d, Article 7 of the Health Code and the order of July, 1983. Defendant State of New York asserts that the State has sovrign (sic) immunity and can only be sued in the Court of Claims for those actions that it has statutorily surrendered its immunity and that this court, therefore, is not a proper forum for suit brought against the State. Further the State urges that this dispute is between the City Health agency and the plaintiff's and that the complaint fails to connect the State with the controversy.

The State as sovereign is immune from suit unless it has specifically consented thereto by express constitutional or legislative enactment. (Psaty v Duryea, 306 NY 413, Ni-

agara Falls Power Co. v. White 292 NY 472; Ferro v Lavine 79 Misc 2d 437 aff'd 42 AD2d 313). New York Constitutions Act. III §19 and Article VI §9 provide a partial waiver of immunity to permit suits involving a proprietary right in the Court of Claims. (Glassman v Glassman 309 NY 439; Glen v. Rockefeller 61 Misc. 2d. 942 aff'd 34 AD2d 930). CPLR 3001, however, vests the Supreme Court with authority to render a declaratory judgment as to rights and other legal relations of the parties to a justiciable controversy. Frequently the vehicle of a declaratory judgment action is used to test the constitutionality of statutory provisions (Weinstein, Korn, Miller, N. Y. Civ. Pract. §3001.06g p. 30 49 et seq.). In these cases the Supreme Court has asserted its right to pass upon the questions involved. (See e.g. Ohio v. People 264 AD 220). This being a declaratory judgment action involving a challenge to the constitutionality of Chapter 221 of the Laws of 1980 such suit falls within the ambit of the jurisdiction of this court.

Defendant State of New York's claim that there is not nexus between it and the activities complained of by plaintiff's is belied by a reading of the complaint. Chapter 221 of the Laws of 1980 was enacted by the State, not the City, above, and is itself being challenged directly. As the enabling legislation for other statutes and regulations challenged, it stands at the center of the controversy. For there to be a complete resolution of the matters in dispute, a determination as to whether the State's enactment of Chapter 221 violates any constitutional precepts is required. The State, as the promulgator of the legislation is a proper party defendant to such a challenge. Dismissal for failure to state a cause of action is not warranted. Consequently, the motion to dismiss is in all respects denied.

To obtain a preliminary injunction, plaintiff must show a clear right to such relief by demonstrating a likelihood of success on the merits, irreparable injury

absent such relief and that the balance of the equities lies in their favor (See Albini v. Solork Associates 37 AD2d 835). Plaintiffs have not demonstrated the existence of these requirements.

Accordingly, the motion for a preliminary injunction is denied. The above constitutes the decision and order of the court.

Dated: 1/26, 1984

/s/ S S O

J.S.C.

New York City Health Code, Article 7, §7.01

§7.01 Administrative tribunal; establishment, powers and duties

There is hereby established in the Department an Administrative Tribunal which shall have the power and duty:

(1) to accept pleas to, and hear and determine allegations by the Department of, violations of this Code by any business, trade, occupation or other activity holding, or required to hold, a permit issued by the Board or the Commissioner, or registered, or required to be registered, with the Department;

(2) to examine witnesses and receive evidence;

(3) to impose fines, penalties and forfeitures in accordance with Section 3.12 of this Code;

(4) to compile and maintain complete and accurate records relating to its proceedings, including copies of all findings of violation served, answers, notices of appeal and briefs filed, and decisions rendered by the hearing examiners and the Review Board;

(5) to adopt such rules and regulations as may be necessary or appropriate to effectuate the purposes of this article, including rules and regulations prescribing the organization of the Tribunal, the hearing procedures, the number of copies and the forms of various documents to be filed, and the manner of payment of penalties;

Governor Mario Cuomo's Memorandum on Approving Chapter 282, Laws 1986, July 19, 1986.

THE EXECUTIVE
Ch.282

DEPARTMENT OF TAXATION AND FINANCE—
DIVISION OF TAX APPEALS

On approving L.1986, c. 282, the Governor stated:
July 19, 1986

The bill, which is part of my 1986 Legislative program, directs the conversion of the State Tax Commission into the Tax Appeals Tribunal. The intention of the legislation is to further the goal of equitable tax administration by enhancing the impartiality in the New York State tax appeals system.

Recent studies completed by the Legislative Tax Study Commission and the New York State Bar Association have raised the concern that the perception exists that the current tax appeals system is inherently unfair because the same administrative body, the State Tax Commission, is responsible for the collection, assessment and enforcement of the taxes it administers through the Department of Taxation and Finance as well as the adjudication of controversies arising from such administration. Although no factual evidence of bias or lack of due process has been documented, the legislation eliminates any appearance of a conflict of interest by establishing a separate and independent administrative body, the Tax Appeals Tribunal, whose sole function will be to adjudicate disputes between the Department of Taxation and Finance and the public. An independent Division of Tax Appeals is created which will be responsible for the administrative hearing process and will be administered by the Tax Appeals Tribunal.

The reorganization effected by the bill reflects important concerns for taxpayer rights. It will result in separa-

tion of the rule-making and enforcement responsibilities of the Department and the Commissioner of Taxation and Finance from the quasi-judicial responsibilities of the Tax Appeals Tribunal. The legislation represents another excellent measure that will further the interests of the New York State taxpayer and is the product of the joint efforts of private industry, the Legislature and this Administration.

The bill is approved.

Mario M. Cuomo

Notice of Appeal
Index No. 19890/83

COURT OF APPEALS
STATE OF NEW YORK

NEW YORK STATE RESTAURANT ASSOCIATION, INC.; BUS TRAVELERS INN, INC.; and HERO-BOY, INC., d/b/a Manganaro's Hero-Boy Restaurant,

Appellants,

-against-

THE CITY OF NEW YORK; and DAVID J. SENCER, M.D., M.P.H., Commissioner of Health of The Department of Health, and Chairman of the Board of Health,

Respondents.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that NEW YORK STATE RESTAURANT ASSOCIATION, INC., et al., the appellants above named, hereby appeal to the Supreme Court of the United States from the final order of the State of New York Court of Appeals entered in this action on July 10, 1986, leaving standing an order of the Appellate Division of the Supreme Court, First Judicial Department, entered on April 1, 1986 affirming the Judgment of Special Term of the Supreme Court, New York County, entered October 29, 1985 (1) granting the respondents' motion for summary judgment; (2) denying the motion of appellants for summary judgment; and (3) dismissing the complaint of appellants.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Dated, New York, N.Y.
September 17, 1986

GERARD A. NAVAGH
Attorney for Appellants
NEW YORK STATE RESTAURANT
ASSOCIATION, INC., et al.
420 Lexington Avenue
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(212) 687-5666

TO: County Clerk of
New York County

Hon. Robert Abrams
Attorney General of the State of New York
Attention: Solicitor General
State Capitol
Albany, New York 12224

Frederick A.O. Schwarz, Esq.
Corporation Counsel of the
City of New York
100 Church Street
New York, N.Y. 10007

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MARIE W. KELLY, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at Larchmont Acres, Larchmont, New York.

On September 17, 1986, deponent served the within Notice of Appeal upon

HON. NORMAN GOODMAN
County Clerk
New York County
60 Centre Street
New York, N.Y. 10007

HON. ROBERT ABRAMS
Attorney General of the State of New York
Attention: Solicitor General
State Capitol
Albany, New York 12224

FREDERICK A.O. SCHWARZ, JR., ESQ.
Corporation Counsel of the
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100 Church Street
New York, N.Y. 10007

the attorneys for the parties in this action, at the addresses designated by said attorneys for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in - a post office - official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

/s/ Marie W. Kelly
Marie W. Kelly

Sworn to before me this
17th day of September, 1986
/s/ Gerard A. Navagh

GERARD A. NAVAGH
Notary Public, State of New York
No. 60-4819520
Qualified in Westchester County
Commission Expires March 30, 1987

No. 86-581 (2)

Supreme Court, U.S.
FILED
DEC 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

NEW YORK STATE RESTAURANT ASSOCIATION, INC.; BUS TRAVELERS INN, INC.; AND HERO-BOY, INC., d/b/a Manganaro's Hero-Boy Restaurant,

Appellants,

vs.

THE CITY OF NEW YORK; and DAVID J. SENCER, M.D., M.P.H., Commissioner of Health of the Department of Health,

Appellees,

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS

MOTION TO DISMISS OR AFFIRM

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December 10, 1986

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

NEW YORK STATE RESTAURANT ASSOCIATION, INC., BUS TRAVELERS INN, INC.; AND HERO-BOY, INC., d/b/a Manganaro's Hero-Boy Restaurant,

Appellants,

vs.

THE CITY OF NEW YORK; and DAVID J. SENCER, M.D., M.P.H., Commissioner of Health of the Department of Health,

Appellees,

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS

MOTION TO DISMISS OR AFFIRM

STATEMENT

The appellees, The City of New York and David J. Sencer, Commissioner of Health of the New York City Department of Health, move to dismiss the appeal herein, or, in the alternative, to affirm the final order of the

Court of Appeals of the State of New York entered July 10, 1986 on the grounds that the appeal does not present a substantial federal question or that the federal question sought to be reviewed was not properly raised and was not expressly passed on.

QUESTIONS PRESENTED

1. Whether Article 7 of the New York City Health Code, which establishes an administrative tribunal in the New York City Department of Health for adjudication of alleged violations of the laws enforced by the Department, is violative of due process?

2. Whether the July 6, 1983 Order of the New York City Commissioner of Health, which announced a new Department of Health enforcement policy and outlined a mechanism for pleading by mail to notices of violation issued by the Department, is unconstitutionally vague?

3. Where plaintiffs raised for the first time on appeal in state court that the Department's inspections of restaurant premises are tantamount to "unreasonable searches" in violation of the Fourth Amendment, and the courts of New York did not pass on the issue, may jurisdiction be sustained under 28 U.S.C. §1257(2)?

FACTS

(1)

The general enabling legislation for the Department of Health is found in Chapter 22 of the New York City Charter. That chapter vests in the Department and its commissioner the authority necessary to regulate all matters affecting health in the City of New York (NYC Charter, §§555, 556). The Charter also provides for a Board of Health within the Department whose chair shall be the Commissioner of the Department of Health (NYC Charter, §553). The Board of Health

is authorized to add to, amend or repeal any part of the Health Code of the City and may: "...confer additional powers on the Department not inconsistent with the constitution, laws of this state or charter, and may provide for the enforcement of the health code or any orders made by the commissioner or the board of health, by such fines, penalties, forfeitures and imprisonment as may be prescribed therein or otherwise by law" (NYC Charter, §558[b]).

The New York City Health Code ("Health Code") had been promulgated pursuant to the authority of section 558 (formerly §1706[2]) of the Charter and establishes, inter alia, the enforcement procedures of the Department. Article 3 of the Health Code is a general statement of the authority of the Department and provides that the Department may inspect any premises (including restaurants) where an

activity regulated by the Health Code is being carried on (Health Code, §3.01). Any person or establishment which is determined to have violated the code is subject to a fine, penalty or forfeiture of any permit issued by the Department (Health Code, §3.12). Prosecution of every violation is not mandated by the code. Pursuant to section 3.13 of the Health Code, the Department may seek voluntary compliance through the issuance of notices and warnings or may proceed by other educational alternatives. However, the availability of such voluntary methods does not restrict the Department in its use of compulsory enforcement methods and there is no requirement that voluntary or non-compulsory methods be employed prior to the commencement of any code enforcement proceeding. As part of its enforcement powers, the Department has classified

various types of code violations for restaurants and other food-service establishments. Those violations which are considered the most serious are classified as "Schedule A"; all other violations are "Non-Schedule A". The Schedule A list was last revised in 1974.

In addition to classification of violations, since 1980 the Department has also employed the Value Reference Scoring System ("VRSS"), a numerical scoring system which establishes a minimum passing score for an inspection. Both the classification system and the scoring system are explained as part of the mandatory food protection course given by the Department to all new food-service establishment licensees.

Prior to 1971, the Department charged Health Code violators with a misdemeanor in a criminal action brought in the then-Magistrate's Court. It may still seek

criminal penalties in Criminal Court; however, as a matter of policy, the Department has currently chosen to pursue civil rather than criminal sanctions for Health Code infractions.

Article 7 of the Health Code, which was enacted in 1971, establishes an administrative tribunal to hear and determine allegations by the Department of code violations and to impose fines and penalties (Health Code, §7.01). After notification of the violation, the licensee may either admit to the violation and pay a fine or may serve an answer and demand a hearing before the tribunal. At the hearing, the burden of proof is on the Department and the licensee has the right to be represented by counsel, to present evidence and to cross-examine witnesses (Health Code, §7.09). An adverse determination can be appealed to a department review board (Health Code,

§7.13), and the determination of the review board is subject to judicial review in an Article 78 proceeding.

With respect to the fines imposed by the administrative tribunal, section 558(d) of the New York City Charter was amended by Chapter 221 of the Laws of 1980 to permit the tribunal to docket a final judgment in a court of competent jurisdiction. That subdivision also provides that the violation of any section of the Health Code may be prosecuted as a misdemeanor.

Supplementing this statutory and regulatory framework are several orders and directives of the Commissioner of the Department. Prior to 1976, the Department did not issue a notice of violation until a food-service establishment failed three inspections. Warnings were issued on the first two occasions. In 1976, the Department issued a directive, enforcement procedure

OEH-29, which changed that policy. Pursuant to that directive, a notice of violation was issued to any estabishment which failed an initial inspection and one reinspection. Thereafter, on July 6, 1983, the Commissioner of Health issued an order which once again changed the enforcement policy. Effective August 1, 1983, the Department would issue a notice of violation to a restaurant failing any inspection. In a cover letter accompanying a copy of his enforcement order sent to licensees, the Commissioner stated that this policy change was made necessary because "more than half of all inspected restaurants fail their first inspection before initiating corrective action".

In addition, the Department publishes the names of those establishments which have been adjudged by the administrative tribunal (either after hearing or upon admission of

violation) to have committed violations of the Health Code and the restaurant has failed both an initial inspection and one re-inspection. N.Y.C. Administrative Code, §§556-1.0, 556-9.0[1]

(2)

On or about August 5, 1983, the plaintiffs in this action, a trade association representing 1,200 New York City restaurants licensed by the Department of Health, and two named restaurants so licensed, served defendants State of New York,[2] City of New York, and Commissioner

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[1]The New York City Administrative Code was recodified effective September 1, 1986. Sections 556-1.0 and 556-9.0 of the Administrative Code have been recodified as sections 17-103 and 17-112, respectively.

[2]By order of the Appellate Division, First Departent, dated November 8, 1984, the complaint was dismissed against defendant State of New York for failure to state a cause of action.

of Health of the City of New York with a summons and complaint alleging, inter alia, that Article 7 of the Health Code, section 558(d) of the New York City Charter (amended by Chapter 221 of the Laws of 1980) and the July 6, 1983 Order of the New York City Commissioner of Health violate the State and Federal Constitutions. Plaintiffs sought a judgment declaring these statutes and regulations unconstitutional and void. With the complaint, plaintiffs also served an order to show cause for a preliminary injunction, enjoining implementation of the Commissioner of Health's July 6, 1983 Order.

By order of the Supreme Court, New York County (OSTRAU, J.), entered on February 6, 1984, plaintiffs' motion for a preliminary injunction was denied. The Court held, inter alia, that plaintiffs failed to demonstrate a likelihood of success on the merits. The Appellate Division, First

Department, in an order dated November 8, 1984, affirmed so much of the order appealed from as denied plaintiffs' motion for a preliminary injunction.

After issue was joined, plaintiffs moved, and defendants cross-moved, for summary judgment. Special Term, in an order entered October 29, 1985, denied plaintiffs' motion for summary judgment and granted defendants' cross-moton for summary judgment and dismissed the complaint. The Appellate Division, First Department, in an order entered April 1, 1986, unanimously affirmed for the reasons stated by Eugene Wolin, J., at Special Term. The New York Court of Appeals dismissed the appeal, sua sponte, upon the ground that no substantial constitutional question is directly involved.

OPINIONS BELOW

Supreme Court, New York County (Wolin, J.)

Special Term considered each of plaintiffs' constitutional attacks on the Department's regulatory and enforcement procedures and found them to be without merit. The Court found that the establishment of an administrative tribunal is within the broad grant of authority given to the Board of Health by section 558(b) of the New York City Charter. It noted that New York Courts have repeatedly held that section 558 is not an unconstitutional delegation of power by the Legislature but rather a permissible exception grounded in the belief that the protection of public health is a matter best left to the locality involved. The enabling statutes give the Board of Health broad discretion in selection of enforcement measures necessary to safeguard the public health including the promulgation

of regulations, the creation of a classification system for code violations and the establishment of an administrative tribunal.

The Court likewise found that the procedures established by the Board of Health to adjudicate whether Health Code violations have occurred comported with due process in all respects. The Court noted that a licensee who has failed an inspection is given a statement of the violations found and may demand a hearing before the tribunal. At that hearing, the burden is on the Department and the licensee has the right to be represented by counsel, to present evidence and to cross-examine witnesses. The determination of the tribunal is subject to administrative review and then to judicial review.

The Court also rejected plaintiffs' claims that the July 6, 1983 Order of the Commissioner of Health was unconstitutionally

vague. The Court held that the Order clearly delineates the enforcement policy of the Department and refers to the well-established classification system for code violators as well as the scoring system used by the Department. The Court further noted that the Schedule A violations and the scoring system are topics explained as part of the mandatory course given to licensees by the Department.

Finding all the other claims raised by plaintiffs to be similarly without merit, the Court dismissed the complaint.

Appellate Division
119 AD2d 427
500 NYS2d 224 (1986)

The Appellate Division unanimously affirmed the judgment (denominated order) appealed from for the reasons stated by Eugene Wolin, J., at Special Term.

New York Court of Appeals
68 NY2d 753 (1986)

The Court of Appeals sua sponte dismissed the appeal upon the ground that no substantial constitutional question is directly involved.

ARGUMENT

THE APPEAL SHOULD BE DISMISSED FOR LACK OF A SUBSTANTIAL FEDERAL QUESTION. ARTICLE 7 OF THE NEW YORK CITY HEALTH CODE, WHICH ESTABLISHES AN ADMINISTRATIVE TRIBUNAL TO HEAR AND DETERMINE WHETHER ALLEGED VIOLATIONS OF THE HEALTH CODE HAVE OCCURRED, IS CONSTITUTIONAL IN ALL RESPECTS.

Whether the Board of Health Had the Power to Promulgate Article 7 of the Health Code Is Exclusively A State Law Question Which Was Raised Below And Decided Under State Law.

In the proceedings below, plaintiffs argued that the promulgation of the Health Code by the Board of Health constitutes an invalid exercise of authority vested in the State Legislature by Article 3, §1 of the

State Constitution and in the City Council by Chapter 2, §21 of the City Charter. Special Term, in ruling on this issue, held that the establishment of an administrative tribunal is within the broad grant of authority given to the Board of Health by section 558(b) of the New York City Charter.

Pursuant to section 558(b) of the New York City Charter, the Board of Health of the City of New York has been empowered with "broad discretion in the selection of measures by which the public health may be protected within the field of its jurisdiction," (Stracquadanio v. Department of Health, 285 NY 93, 97, 32 NE2d 806 [1941]), and broad authority to legislate on all matters relating to health (Grossman v. Baumgartner), 17 NY2d 345, 351, 271 NYS2d 195, 218 NE2d 259 [1966]), including power to "add to and alter, amend or repeal any part of the health code" and to "confer additional powers on

the department [of health] not inconsistent with the constitution, laws of this state or [the New York City] charter." N.Y.C. Charter, §558(b). This legislative power has been consistently upheld against charges that section 558(b) constitutes an improper delegation of the authority reserved to the State Senate and Assembly by Article III, section 1, of the State Constitution. Quaker Oats v. City of New York, 295 NY 527, 538-539 (1946), 68 NE2d 593, aff'd, 331 US 787 (1946); People v. Blanchard, 288 NY 145, 147, 42 NE2d 7 (1942); Colon v. Marshall, 185 Misc 638, 641, 59 NYS2d 52 (Sup. Ct., Kings Co., 1945), aff'd, 271 App Div 972, 68 NYS2d 438 (1947). Thus, the Board of Health lawfully created Article 7's tribunal pursuant to section 558(b) of the City Charter. Since this issue was resolved against plaintiffs on State law grounds, no appeal to this Court lies. See Herb v. Pitcairn, 324 US 117, 125-126 (1945);

McGoldrick v. Compagnie Generale Transtlantique, 309 US 430, 434-435 (1940); 12 MOORE'S FEDERAL PRAC. ¶511.01 (2d ed. 1982).

Plaintiffs' Due Process Claims Are Without Merit.

Under the statutory scheme involved here, a licensee who has failed an inspection is given a statement of the violations found and may demand a hearing before the tribunal. Article 7 of the Health Code contains detailed proceedings concerning service and content of the notice of hearing (Health Code, §7.05); provides for impartial hearing officers (Health Code, §7.11); guarantees the right to counsel, to present evidence, and to cross-examine witnesses (Health Code, §7.09); and establishes an internal review board (Health Code, §7.13), with judicial review in an Article 78 proceeding. The presence of these elements has been held sufficient to protect due

process rights. See, Smith v. Organization of Foster Families for Equity and Reform, 431 US 816, 848 (1977); National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 US 1, 47 (1937).

Despite these extensive due process protections, plaintiffs nevertheless assert that the fact that the Board and Department of Health possess a combination of executive, legislative, and quasi-judicial functions must constitute a per se violaton of due process. This issue does not present a substantial constitutional question because it is well-settled that if power has been validly delegated to an administrative agency by the appropriate legislative body, as it has in the case of the Board and the Department of Health, nothing hinders the uniting of executive, legislative and judicial powers in a single hand. Prentis v. Atlantic Coast Line, 211 US 210, 225 (1908); see also,

Keller v. Potomac Electric Power Co., 261 US 428, 433 (1922); Saratoga Springs v. Saratoga Gas and Electric Co., 191 NY 123, 83 NE 693 (1908).

In Tumey v. Ohio, 273 US 510, 534 (1927) and Ward v. Village of Monroeville, 409 US 57, 60 (1972), cited by plaintiffs, this Court stated, with respect to a small town mayor who also served as judge in a municipal court, that "the mere union of the executive and judicial power in him cannot be said to violate due process of law." However, in Tumey and Ward, this Court found violations of due process because the mayor either received direct financial advantage from the fines he levied as judge, or the Court found that his executive responsibility for village finances was likely to render him partisan, or both.

Under the statutory scheme involved herein, the Department of Health's hearing

examiners are prohibited by law from performing any non-adjudicative services for the Department (Health Code, §7.03), and receive no financial gain from finding an alleged violator guilty. Their connection with the executive and legislative activities of the Department and Board is too remote to violate due process. See, Dugan v. Ohio, 277 US 61 (1918).

The July 6, 1983 Order of the Commissioner of Health Is Not Unconstitutionally Vague.

In seeking to sustain an appeal as of right to the New York Court of Appeals on constitutional grounds, pursuant to McKinney's Civil Practice Law and Rules, section 5601(b)(1), plaintiffs filed two statements with the Court -- a Jurisdictional Statement pursuant to Rule 500.2 of the Rules of the Court of Appeals and a letter in support of retention of jurisdiction in response to the Court's sua sponte

examination of jurisdiction. In both statements, plaintiffs failed to raise the issue of vagueness. That issue is therefore not properly before this Court. See Illinois v. Gates, 462 US 213, 217-224 (1982), reh. den., 463 US 1237 (1983); McGoldrick v. Compagnie Generale Transatlantique, supra, 309 US at 434-434; 12 MOORE'S FEDERAL PRAC. ¶510.01.

In any event, plaintiffs' wholly conclusory claim that the July 16, 1983 Order is unconstitutionally vague is without merit.

The Commissioner's Order of July 6, 1983 merely announced the Department of Health's decision to issue violations when a restaurant failed to pass inspection on the first visit, rather than to give a warning on the first inspection and to issue a formal violation only if the code infringement observed by inspectors had not been

eliminated by the time of a second, follow-up inspection. The Order also informed restaurant owners that, if they chose to do so, they could eliminate the required personal appearance before the Department's administrative tribunal by pleading guilty to an alleged violation by mail and paying a pre-assessed fine as set forth in a schedule of fines included in the Order.

Language is unconstitutionally vague only if it "fails to give adequate warning of what activities it proscribes or fails to set out 'explicit standards' for those who must apply it." Broadrick v. Oklahoma, 413 US 606, 607 (1973); see also, Roth v. United States, 354 US 476, 491 (1957); United States v. Petrillo, 332 US 1, 7-8 (1947). The July Order clearly delineates the enforcement policy of the Department and refers to the well-established classification system for code violations as well as to the scoring system

used by the Department to determine the existence and severity of violations. Both are topics explained as part of the mandatory course given to licensees by the Department. The Order instituted no substantive change from past practices. The July 6, 1983 Order is not unconstitutionally vague.

Plaintiffs' Fourth Amendment Claim Which Was Raised For the First Time In The Appellate Division Was Not Passed On By The New York Courts And Thus An Appeal to this Court Does Not Lie.

It is well-settled that this Court will not undertake to review what the court below did not decide. Walters v. City of St. Louis, 347 US 231, 233 (1954).

Plaintiffs argued for the first time on appeal in the Appellate Division that the Department's inspections of restaurant premises are tantamount to "unreasonable searches" in violation of the Fourth Amendment. Defendants had no opportunity

to offer evidence on this issue in the trial court. Since this claim was not included in plaintiff's complaint, and there is no allegation that any restaurant proprietor withheld consent to Department inspections, this issue was not properly raised on appeal and, in fact, was not ripe for review. Since the Appellate Division affirmed the grant of summary judgment in defendants' favor for the reasons stated by Special Term, and the issue was not before Special Term, it appears that the Appellate Division did not pass on the issue. The New York Court of Appeals dismissed the appeal for want of a substantial Constitution question. In New York, the Court of Appeals cannot review a constitutional issue where it was not raised below. Anonymous v. Codd, 40 NY2d 860, 387 NYS2d 1004, 356 NE2d 475 (1976). Since the issue was not passed on below, it cannot sustain an appeal as of right to this Court.

In any event, the claim that the Department's inspections of restaurant premises are tantamount to "unreasonable searches" in violation of the Fourth Amendment is without merit. While the Fourth Amendment's prohibition against unreasonable searches and seizures applies to administrative inspections of private commercial property (Marshall v. Barlow's, Inc., 436 US 307 [1978]; See v. City of Seattle, 387 US 541 [1967]; Sokolov v. Village of Freeport, 52 NY2d 341, 438 NYS2d 257, 420 NE2d 55 [1981]), a long-standing exception to the search warrant requirement has been recognized for "pervasively regulated business[es]," (United States v. Biswell, 406 US 311, 316 [1972]), and for "closely regulated" industries "long subject to close supervision and inspection" (Colonnade Catering Corp. v. United States, 397 US 72, 74, 77 [1970]). These decisions

"make clear that a warrant may not be constitutionally required when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal [or state] regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." Donovan v. Dewey, 452 US 594, 600 (1981).

Such is the case here. The food industry is a closely regulated business and, as such, has been held to fall within the "Biswell-Colonnade" exception permitting warrantless administrative inspections in furtherance of the regulatory scheme. United States v. Gel Spice Co., Inc., 601 F Supp 1214, 1229 (E.D.N.Y., 1985); United States v. New England Grocers Supply Co., 488 F

Supp 230, 238 (D. Mass., 1980); City of Chicago v. Pudlo, 123 Ill. App 3d 337, 462 NE2d 494 (1983), cert. den., 105 S Ct 2140 (1985); see, United States v. Jamieson-McKames Pharmaceuticals, Inc., 651 F2d 532, 536-538 (8th Cir., 1981), cert. den., 455 US 1016 (1982); cf., United States v. Gordon, 655 F2d 478, 482-484 (2d Cir., 1981) (warrantless search pursuant to New York State Insurance Law did not violate the Fourth Amendment). Each restaurant proprietor, as a participant in a pervasively regulated business, "has voluntarily chosen to subject himself to a full arsenal of governmental regulation" (Marshall v. Barlow's Inc., supra, 436 US 307, 315). The inspections provided for pursuant to section 566 of the City Charter, and sections 3.01 and 3.05 of the Health Code, insure compliance with, and deter evasion of, the New York City Health Code. These

inspections are an essential part of the regulatory scheme and are fully consistent with the Fourth Amendment. See United States v. Biswell, supra, 406 US 311.

CONCLUSION

THE APPEAL SHOULD BE DISMISSED FOR LACK OF JURISDICTION. ALTERNATIVELY, THE ORDER APPEALED FROM SHOULD BE AFFIRMED. IF THE JURISDICTIONAL STATEMENT IS TREATED AS A PETITION FOR WRIT OF CERTIORARI, THE PETITION SHOULD BE DENIED.

Respectfully submitted,

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APPENDIX

New York City Charter

CHAPTER 22

DEPARTMENT OF HEALTH

§551. Department; commissioner. a. There shall be a department of health, the head of which shall be the commissioner of health who shall be appointed by the mayor....

* * *

§553. Board of health. a. There shall be in the department a board of health, the chairman of which shall be the commissioner....

* * *

§556. Functions, powers and duties of the department. Except as otherwise provided by law, the department shall have jurisdiction to regulate all matters affecting health in the city of New York and to perform all those functions and operations performed by the city that relate to the health of the people of the city....

* * *

§558. Health Code.***

(b) The board of health from time to time may add to and alter, amend or repeal any part of the

health code, and may therein publish additional provisions for security of life and health in the city and confer additional powers on the department not inconsistent with the constitution, laws of this state or this charter, and may provide for the enforcement of the health code or any orders made by the commissioner or the board of health, by such fines, penalties, forfeitures and imprisonment as may be prescribed therein or otherwise by law.

* * *

New York City Health Code

ARTICLE 3 GENERAL PROVISIONS

§3.01 General powers of the Department

(a) The Department may inspect any premises, matter or thing within its jurisdiction, including but not limited to any premises where an activity regulated by this Code is carried on, and any record required to be kept pursuant to this Code.

(b) In order to determine whether the provisions of this Code or the provisions of other law which the Department has the duty to enforce pursuant to section 556(c) of the Charter are being complied with, the Department may investigate or authorize an investigation to be made of any

matter, incident, thing, person or event within its jurisdiction.

* * *

§3.12 Fines, penalties and forfeitures for certain violations of the Code.

Any person who is determined to have violated this Code, or who holds, or is required to hold, a permit from the Board or the Commissioner or who is registered, or required to be registered, with the Department shall be subject to a fine, penalty and forfeiture of not more than five hundred dollars for each violation of a provision of this Code relating to such businesses, trades, occupations or other activities. Each such violation shall be a separate and distinct offense, and in the case of a continuing violation, each day's continuance thereof shall be a separate and distinct offense.

§3.13 Enforcement of Code otherwise than by prosecution or other compulsory means

In lieu of enforcement of this Code by way of prosecution, recovery of civil penalties, revocation of permits, seizure, embargo and condemnation, and other compulsory means, the Department may seek to obtain the voluntary compliance with this Code by way of notice, warning or other educational means; this section

does not, however, require that such non-compulsory methods be used before proceeding by way of compulsory enforcement.

ARTICLE 7
ADMINISTRATIVE TRIBUNAL

§7.01 Administrative tribunal; establishment, powers and duties

There is hereby established in the Department an Administrative Tribunal which shall have the power and duty:

(1) To accept pleas to, and hear and determine allegations by the Department of violations of this Code, the Administrative Code of The City of New York, the Sanitary Code of the State of New York and other laws and regulations which the Department has the duty to enforce;

(2) to examine witnesses and receive evidence;

(3) to impose fines, penalties and forfeitures in accordance with Section 3.12 of this Code;

(4) to compile and maintain complete and accurate records relating to its proceedings, including copies of all findings of violation served, answers, notices of appeal and briefs filed, and decisions rendered by the hearing examiners and the Review Board;

(5) to adopt such rules and regulations as may be necessary or appropriate to effectuate the purposes of this article, including rules and regulations prescribing the organization of the Tribunal, the hearing procedures, the number of copies and the forms of various documents to be filed, and the manner of payment of penalties;

§7.03 Officials of the Tribunal

(a) The head of the Tribunal shall be the Director, who shall be appointed by the Board for a term of three years. The Director may be removed for cause but not without an opportunity to be heard. The Director shall devote full time to the Tribunal and shall perform no other services for the Department. The Director shall have the power to exercise or delegate any of the powers and duties vested in him or in the Tribunal; provided, however, he shall not delegate those powers and duties enumerated in Section 7.11.

(b) The Director shall appoint, in accordance with law, such number of hearing examiners as may be required to discharge the responsibilities of the Tribunal. The hearing examiners, who shall be attorneys admitted to practice in the State of New York, may serve on either a part-time or

full-time basis but shall perform no other services for the Department.

* * *

§7.09 Hearings

(a) Hearings shall be open to the public, presided over by a hearing examiner and shall proceed with all reasonable expedition and order and, insofar as practicable shall be held at one place and shall not be postponed or adjourned;

(b) Each party to a proceeding shall have the right to be represented by counsel, to present evidence, to examine and cross-examine witnesses (subject to the limitation contained in Section 7.07(b)), and shall have all other rights essential to a fair and impartial hearing.

(c) The Department shall have the burden of proving the factual allegations contained in the finding of violation by a fair preponderance of the evidence; however, each finding of violation shall be maintained by the Department as a record kept in the regular course of business and shall be prima facie proof of the facts contained therein.* * *

§7.11 Disqualification of Hearing Examiners

(a) A hearing examiner shall not preside over a hearing in which he

is a party, in which he has been attorney or counsel, or in which he is interested, or if he is related by consanguinity or affinity to any party to the proceeding within the sixth degree. The degree shall be ascertained by ascending from the hearing examiner to the common ancestor, descending to the party, counting a degree for each person in both lines, including the hearing examiner and the party, and excluding the common ancestor.* * *

§7.13 Review Board* * *

(b) The Review Board shall have the jurisdiction to review all final decisions of the hearing examiners with regard to whether the facts found therein are supported by substantial evidence in the record, the law and the penalty, but shall not consider any evidence which was not presented to the hearing examiner. The Review Board, whose decisions shall require the agreement of a majority of its members, shall have the power to reverse, remand or modify any decision appealed from and may reduce the amount of any penalty imposed.

Supreme Court, U.S.
FILED
DEC 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-581

IN THE

Supreme Court of the United States

October Term, 1986

NEW YORK STATE RESTAURANT ASSOCIATION, INC.; BUS TRAVELERS INN, INC.; and HERO-BOY, INC., d/b/a Manganaro's Hero-Boy Restaurant,
Plaintiffs-Appellants,

against

THE CITY OF NEW YORK; and DAVID J. SENCER, M.D., M.P.H., Commissioner of Health of The Department of Health, and Chairman of the Board of Health,
Defendants-Appellees.

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS

Brief in Opposition to Motion to Dismiss or Affirm

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Defendants-Appellees.

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS

Brief in Opposition to Motion to Dismiss or Affirm.

Statement.

The appellants, New York State Restaurant Association, Inc., *et al.*, submit this brief in opposition to ap-

pellees' motion to dismiss or affirm and request that this motion either be summarily dismissed or at the least, probable jurisdiction should be noted in the case. The appeal is from a final order of the Court of Appeals of the State of New York entered on July 10, 1986.

For many years violations of the New York City Health Code were heard in the Magistrates Court, for they were criminal proceedings. On October 28, 1971, the Board of Health promulgated Article 7 of the Code without any enabling legislation from the State, or for that matter, from the City of New York. The enforcement of the resolution was held in abeyance for over a year because it was not filed with the City Clerk.

From the beginning the proposal was ill-fated, with the Department insisting that it be modeled after the City Parking Violations Bureau, Administrative Code §883a-7.0(b), while the appellant Association was contending that the proper constitutional method would be to set up a special Part in the Civil Court as was done with respect to housing violations under Chapter 982 of the Laws of 1972.

As noted in appellants' briefs below, in 1980 the Common Council of the City of Hudson approved an ordinance which made parking tickets returnable to the police department, not the Court. The Court was of the opinion that keeping the return of tickets within the judicial system, "there is no room for ticket fixing or favoritism". The Attorney General ruled the ordinance invalid (New York Law Journal, December 15, 1980).

Chapter 221, Laws of 1980, amended Sec. 558(d) of the City Charter so as to add an extraordinary enabling Act

nine years after the administrative tribunal was created in 1971, and had the following opening sentence:

> "Any violation of the health code shall be treated and punished as a misdemeanor."

Significantly, that section is omitted in appellees' appendix (A1), although quoted and set forth in extense in its previous briefs in the Court below.

In January 1985 the New York City Parking Violations Bureau became involved in the largest New York City corruption scandal in fifty years, implicating powerful local political figures and senior officials of the Bureau. The Borough President of Queens committed suicide, and the Borough President of the Bronx has been found guilty under jury verdict of racketeering (18 U.S.C. §1962[c]) and racketeering conspiracy (18 U.S.C. §1962[d]).

This concludes the description of the interconnected parallel courses followed by the Health Code Tribunal and the Parking Violations Bureau legislation in this case. In retrospect it is not surprising that the Parking Violations Bureau scandal arose; the surprise is that it did not happen sooner. The appellants have been concerned about such an abuse of the power since 1971 and have expended a great deal of time and money to remove the temptation for such abuse being put in motion with respect to the administrative tribunal under the Health Code.

Opinion of Supreme Court, Special Term (Wolin, J., October 4, 1985)

The Wolin, J. opinion in Special Term is for the most part the opinion under review by this Court. (Appendix,

4a, Jurisdictional Statement). One of the main contentions of the appellants below was that the Board of Health, by its own unilateral action, transferred jurisdiction from the Magistrates Court to an Administrative Tribunal. This consolidated in the Board the Legislative, Executive and Judicial power, which the appellants claim is unconstitutional, and then brushes off in a few lines the appellants, saying the action implements legislation enactments, citing no authority for its holding.

Citing *Youngstown Co. v. Sawyer,* 343 U.S. 579, Judge Jasen of the New York Court of Appeals carefully analyzed the principles of the constitutional separation of powers in *Subcontractors Trade Association et al. v. Koch,* 62 N. Y. 2d 426, and gave his analysis of the substantive issues involved in the separation of powers of government, stating:

> "We begin our analysis of the substantive issues presented by recognizing that the underlying structure of our representative system of government consists of three branches in which all governmental power is distributed—the executive, legislative and judicial (N. Y. Const., art. III, §1; art. IV, §1; art. VI; see, also, N.Y. City Charter, ch. 1, §3; ch. 2, §21.) Respect for this structure and the system of checks and balances inherent therein requires that none of these branches be allowed to usurp powers residing entirely in another branch. *(Youngstown Co. v. Sawyer,* 343 U. S. 579, 72 S. Ct. 863, 96 L. Ed. 1153; *Matter of Nicholas v. Kahn,* 47 N. Y. 2d 24, 30-31, 416 N. Y. S. 2d 565, 389 N. E. 2d 1086.) In the case before us, we are called upon to decide * * * at what point an exercise of executive power becomes an unlawful infringement upon the legislative function."

Citing *Nixon v. Administrator of Gen. Servs.*, 433 U. S. 425, Justice Wachtler, Chief Judge, stated in *Under 21 v. City of New York,* 65 N. Y. 2d 346, as follows:

> "* * * While the doctrine of separation of powers does not require the maintenance of 'three airtight departments of government' " (*Nixon v. Administrator of Gen. Servs.*, 433 U. S. 425, 443, 97 S. Ct. 2777, 2790, 53 L. Ed. 2d 867; 1 Store, Commentaries on the Constitution §525, *supra*), it does require that no one branch be allowed to arrogate unto itself powers residing entirely in another branch (*Youngstown Co. v. Sawyer, supra; Matter of Nicholas v. Kahn,* 47 N. Y. 2d 24, 30-31, 416 N. Y. S. 2d 565, 389 N. E. 2d 1086)."

Wolin, J., in the case at bar in Special Term, in a passing reference to *Subcontractors Trade Association, supra,* and *Under 21 v. City of New York,* states that these cases merely stand for the proposition that the executive may not implement a remedial program and exceed the stated policy of the legislature. His interpretation would negate the principle of separation of powers entirely. Justice Asch, in the Appellate Division, in *Under 21,* 108 App. Div. 2d 250, was more honest when he stated it was a "vestigial relic." One might not like his conclusion, but he at least had the courage to state it forthrightly and unequivocally.

The Wolin opinion also relies on the parking violation cases of *Rosenthal v. Hartnett,* 36 N. Y. 2d 269, and *Matter of Voccola v. Shilling,* 88 Misc. 2d 103 aff'd 57 A. D. 2d 931 (Appendix 8a and 9a, Jurisdictional Statement). It is significant to note that in spite of that reliance and the respondents reliance on them in the courts below, nowhere

are those cases mentioned in the motion to dismiss or affirm now before the bar, probably because those involved the now discredited parking violations bureau cases, and *Hartnett* involved, in addition, the imposition of a criminal penalty by an administrative board. The opinion by Wolin, J. also points out that the determination of the administrative tribunal would be subject to review in an Article 78 proceeding. In *Ward v. Village of Monroeville,* 409 U. S. 57 (1972), this Court held that there is nothing to suggest that the incentive to convict would be diminished by the possibility of reversal on appeal. Certainly, no such suggestion can be drawn from the numerous appeals in the instant case.

Opinion of Supreme Court, Special Term Ostrau, J., February 6, 1984.

In its motion papers to dismiss or affirm, on page 11, the appellees make reference to the Ostrau, J. decision of February 6, 1984, and point out, out of context, that the plaintiffs failed to demonstrate their likelihood of success. This is an extremely misleading statement, for the rule mentioned is applicable only to an application for a preliminary injunction, and in the application made before issue is joined under New York practice. The appellees could have pointed out that Judge Ostrau's opinion also held that the dismissal of the action of appellants for failure to state a cause of action against the State of New York was unwarranted. It can be plainly seen, that point is a much more significant determination than denial of an application for a preliminary injunction before issue was joined.

At the very outset of this action, the plaintiffs alleged that the procedures of the Department of Health con-

stituted a denial of due process and equal protection of the law under the Fourteenth Amendment of the U.S. Constitution in paragraph Eleventh of the Complaint. The Fourth Amendment prohibiting unreasonable search and seizure is incorporated in the Fourteenth Amendment in actions against the State, and this record is replete with references to the respondents' actions in these procedures in affidavits, regulations (§3.01 on page A2 of appellees' motion) and other documents, and in the reports filed by the Comptroller's office (Jurisdictional Statement, p. 9), which were publicized in the public press and which the appellees collaborated in the preparation of. For a brief summary of appellants' Fourth Amendment point, see page 9 of Jurisdictional Statement. *Marshall v. Barlow's Inc.*, 436 U. S. 307; *Camara v. Municipal Court*, 387 U. S. 523; *See v. City of Seattle*, 387 U. S. 541. *Colonade Catering Corp. v. United States*, 397 U. S. 72 (1970). This case is inapposite since it involved a liquor revenue matter in which Congress expressly granted authority for the search within certain limited conditions which are not present in the instant case.

CONCLUSION.

This motion should either be summarily dismissed or at the least, probable jurisdiction should be noted in this case.

Respectfully submitted,

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